Supreme Court, U.S.
FILED
NOV - 9 1993
OFFICE OF THE CLERK

No. 93-44

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,

Appellants,

—v.—

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF AMICUS CURIAE OF COURTROOM TELEVISION NETWORK IN SUPPORT OF APPELLANTS

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November 9, 1993

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PRELIMINARY STATEMENT

Courtroom Television Network ("Court TV") submits this brief *amicus curiae* in support of the appellants in this case. Each party to this suit has given Courtroom Television Network written consent to the filing of this brief pursuant to Rule 37.3 of this Court, and copies of their consents have been filed with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

Court TV is a 24-hour-a-day, 7-day-a-week cable legal news network and cable programmer dedicated to reporting on the U.S. legal and judicial systems. Court TV began operations on July 1, 1991. It is a joint venture of corporations from both the cable and broadcast television industries. Court TV creates all of its own programming and specializes in extended, "gavel-to-gavel" coverage of civil and criminal trials, both live and on tape, supplemented by attorney commentators who explain the proceedings to a lay audience. Court TV's programming, which covers the judicial process not with sound bites but with full, objective reports of the proceedings, has been widely praised as an innovative form of public service television.

Like commercial television networks, Court TV depends for its continued existence on its ability to secure viewers for its programming, both because cable systems pay on a per-subscriber basis for the programming they carry and because national advertising rates are strongly dependent on the number of viewers a program attracts. Like other cable programmers, Court TV is almost entirely dependent upon cable system operators to deliver its programming. It cannot gain access to any appreciable body of viewers without securing positions in the channel line-ups of a significant number of the thousands of cable systems throughout the country.[1]

The "must-carry" rules that are challenged in this case, 47 U.S.C.A. §§ 534 and 535, mandate that cable operators set aside a certain number of channels to carry local broadcast stations. Because every cable system has a finite number of channels, the must-carry rules reduce the number of channels available to cable programmers and thus make it more difficult for Court TV and other cable programmers to gain positions in

[1] Unless Court TV's programming is carried by cable system operators, the network can reach only the small percentage of viewers who have satellite dishes and can thereby obtain its signal without subscribing to a cable system.

cable system line-ups and, in consequence, more difficult to secure the viewers they need if they are to continue creating and distributing programs.

Court TV is deeply interested in the outcome of this case. The central issue before the Court is whether Congress, consistent with the First Amendment, may require the operators of cable television systems to devote channels to local broadcast stations regardless of the operators' programming preferences and regardless of the effects on other, congressionally disfavored programmers. When the Court decides this case it will determine whether cable operators that would otherwise choose to carry Court TV's innovative news programming will be required to forgo or curtail Court TV's channel access in order to provide channels to local broadcast stations, including shopping networks.

This brief is filed to set forth for the Court the practical impact on a relatively new cable network of the must-carry rules embodied in Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Act"), codified at 47 U.S.C.A. §§ 534 and 535 (West Supp. 1993), and to show that those must-carry provisions, entirely apart from their impact on the First Amendment rights of cable system operators, have a substantial negative impact on the First Amendment interests of cable programmers.

SUMMARY OF ARGUMENT

Court TV's day-to-day experience illustrates the impact that must-carry rules have on cable programmers in general and, in particular, on relative newcomers endeavoring to bring innovative or distinctive programming options to the public. That impact has been to make it significantly more difficult for national cable programmers, particularly new ones, to reach the public—and, of course, for the public to receive such programming. To demonstrate this, this brief summarizes four recent situations in which the 1992 Act's must-carry rules

adversely affected Court TV's ability to be shown at different locations in the country.

ARGUMENT

THE IMPACT OF MUST-CARRY LEGISLATION HAS BEEN TO SUPPRESS THE SPEECH OF CABLE PROGRAMMERS AND TO DEPRIVE THE PUBLIC OF THE OPPORTUNITY TO SEE PROGRAMS OF ITS CHOICE

A. Court TV's Programming And Access To Viewers

Since its creation in 1991, Court TV has specialized in "gavel-to-gavel" coverage of trials, both live and taped, commencing with opening statements and continuing through the jury verdict. Each trial is anchored by a team of experienced attorneys and legal journalists; in voice-overs and during breakaway interviews, commentators highlight significant substantive issues and explain procedural matters. A recent commentary in The New Yorker magazine noted "[t]he superb coverage of state trials by the two-year-old Court TV cable network." *Comment: Here's Justice*, The New Yorker, Oct. 11, 1993, at 8.

Court TV covers both civil and criminal trials, as well as parole hearings, death penalty hearings, and municipal and night courts across the United States. The network has televised proceedings in state, federal, and municipal courts throughout the United States, as well as trials from the former Soviet Union, from El Salvador and Serbia, and from the World Court at the Hague. By broadcasting extended, often live, coverage of a broad range of court proceedings, Court TV aims to enable its audience to understand how trials are actually conducted and to appreciate the broad impact of legal issues and the legal process on public and private life. Court TV's uniquely comprehensive trial coverage provides the public with

an opportunity to observe and understand the reality of the judicial system.

In addition to its comprehensive trial coverage, Court TV reports legal and judicial news several times each day and provides a daily wrap-up and analysis of trial highlights. Several regular weekly and quarterly series present in-depth analyses of aspects of the legal system, background reports on controversial high-profile cases, analysis and commentary on Washington-based legal news and judicial issues, and opportunities to call in to voice opinions or to obtain consumer law information.

Court TV also provides programs specifically designed for education. Each month Court TV selects and summarizes a trial for its "Cable in the Classroom" program, which aims to encourage junior high and high school students to discuss important legal and social issues and analyze the role of the judicial system in settling disputes in society. Each weekend Court TV's programming includes six hours of Continuing Legal Education (CLE) seminars from accredited CLE providers. The network also produces "town meeting" public affairs specials in selected cities several times each year.

As is true of any commercial television network, Court TV's financial success and, indeed, its continued existence depend on its ability to secure viewers for its programming. Court TV earns its revenue from two sources, and both depend on the number of viewers the network can attract. First, cable systems pay fees for programming based on the number of subscribers who have access to the programming. Second, advertisers pay for time, and national advertising rates are strongly dependent on the number of viewers a program attracts.

Court TV, a relatively new cable network at just over two years old, is currently available to 14 million viewers. Although Court TV reaches cable subscribers in 48 states, the District of Columbia, and Puerto Rico, it has access to fewer

than one-fourth of the more than 60 million cable sets in the United States.

Court TV gains access to viewers principally by securing positions in the channel line-ups of the thousands of cable systems throughout the country. Securing channel access for Court TV's programming involves in-person solicitation and negotiation with cable system operators. Where competition is intense because few channels are open to add new cable programmers, the process of seeking channel access typically becomes more expensive and more protracted, often requiring numerous meetings, detailed proposals, and intense negotiation of terms. At the same time the likelihood of success is diminished, since many of the cable channels launched in the last several years are competing for those few available channels.

B. The Must-Carry Provisions of the 1992 Cable Act

Congress passed the Cable Television Consumer Protection and Competition Act of 1992, now codified at 47 U.S.C.A. §§ 531 *et seq.*, on October 5, 1992. The 1992 Act authorizes extensive regulation of the cable industry by the Federal Communications Commission ("FCC"). Sections 4 and 5 of the 1992 Act, 47 U.S.C.A. §§ 534 and 535, require cable system operators, on request, to carry the signals of certain local broadcast stations.[2]

Section 4 requires cable system operators to carry, on request, the signals of licensed commercial broadcast television stations whose signals are received over the air in the same

[2] Must-carry rules were first formulated by the FCC in 1965. *See The D.C. Circuit Review—Federal Communications Commission: Must-Carry and the Continuing Search for a First Amendment Standard of Review for Cable Regulation*, 57 Geo. Wash. L. Rev. 1248, 1251 n.26 (1989). The FCC's must-carry rules were twice struck down by the D.C. Circuit. *See Quincy Cable TV, Inc.* v. *FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986), and *Century Communications Corp.* v. *FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

television market as the cable system. A cable system operator with 12 channels or fewer but at least 300 subscribers must deliver the signals of at least three local broadcast stations. If the cable system operator has more than 12 channels, it may be required to set aside as many as one-third of its active, usable channels. If the number of local broadcast stations does not fill all of those channels, the operator must also carry one or two "qualified" low power broadcast stations.

Under Section 5 of the 1992 Act, a cable system operator with 12 channels or fewer must carry the signal of one local non-commercial educational broadcast station. Cable system operators with more than 12 but fewer than 36 channels must carry from one to three qualified non-commercial stations. A cable system operator with more than 36 channels must carry the signal of every local non-commercial educational broadcast station that requests carriage, unless a station's programming substantially duplicates that of another station the cable system already carries.

Both sections prohibit the cable system operator from accepting or requesting payment from local broadcasters; both require that the cable system operator carry the broadcaster's entire programming schedule; and both give the broadcaster the option of retaining its current channel position.

C. The Adverse Impact Of Must-Carry Rules On Court TV's Ability To Be Seen

1. Connecticut

Cablevision of Connecticut ("CVC") and Cablevision of Southern Connecticut ("CVSC") are charter Court TV affiliates—both launched the network on its first day on the air in 1991 and both have expressed to Court TV their high degree of satisfaction with subscribers' response to Court TV's programming. Together, the two systems serve approximately 183,300 subscribers in the area of Fairfield County, Connecticut.

Even before the 1992 "must-carry" rules were enacted, the systems' limited channel capacity often made it necessary for several satellite services to share one channel. Nonetheless, CVC carried Court TV 24 hours a day (except for minimal interruption for certain sports programs). CVSC carried Court TV from 6 a.m. until 6 p.m. on Mondays through Fridays.

The 1992 must-carry provisions have severely limited the viewable hours of Court TV on these cable systems. CVC has been required to carry three local broadcast stations. Two of these stations had previously shared one cable channel, but under the 1992 Act the cable system was forced to dedicate a full channel to each. It was also required to add a shopping channel that leases its 6:00 p.m. to 9:00 p.m. time to others. As a consequence, Court TV has gone from full-time carriage with minimal interruptions to sharing a channel with two sports programmers, with Court TV preempted for all live sports events.

CVSC was also forced to carry the shopping channel. As a result, Court TV has been moved from a daytime schedule that allowed subscribers to view more than 80 percent of Court TV's live trial coverage to the time slot from midnight to 11:30 a.m.

Since the first day of the new schedule viewers have complained about interruptions in Court TV's programming, about the reduction in its air time, and about the quality of programming on the must-carry channels. Nonetheless, even further reductions may soon be required to accommodate additional "local" broadcast stations that the systems will be required to carry.[3] Solely because of the must-carry rules, Court TV risks losing its carriage entirely on one of the largest cable systems in the country.

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[3] One of these "local" stations is in New Jersey; two others are in New York.

2. New Jersey

Approximately 230,000 subscribers in Northern New Jersey are served by Suburban Cablevision, the tenth largest cable system in the United States. In December 1991 Court TV submitted a formal proposal, the first step in attempting to sell its programming to Suburban Cablevision. Six months and several meetings later, Court TV submitted its second proposal.

After another three months had passed, Court TV was told that it could not secure a slot in the basic tier, but might win a position on a new tier the system was considering testing. Negotiations on pricing stretched over approximately two months, finally resulting in a deal letter. The test of the new tier began, with Court TV on Channel 53. After two months, plans for the new tier were put on hold, in large part because Suburban was not sure it would have enough channel capacity for all of the programming services in the test after "must-carry" absorbed several channels.

Court TV then submitted a third proposal, this time seeking a slot in the basic tier because at least two of the channels Suburban had planned to use for the new tier had been lost to must-carry. Court TV did not win a slot on Suburban's basic tier. Because of the must-carry requirements, the system had no room for Court TV.

The network then identified an opportunity for partial carriage and is now carried from 6 a.m. to 8 p.m. on a channel shared with another programmer. Subscribers cannot watch many of Court TV's popular evening programs, so its advertising revenues are reduced. Court TV's audience is further reduced by the fact that it is now carried on Channel 96, a position on the dial that is seldom reached by viewers browsing for a viewing choice. An executive of Suburban wrote to Court TV that he believed Suburban's customers "would prefer to have Court TV instead of the extremely marginal broadcast channels" the cable operator had been forced to add.

3. Illinois

Continental Cablevision provides cable programming services to approximately 110,000 subscribers in the suburban Chicago area. The Chicago area is a major television market and one that should play a significant part in Court TV's future growth. After more than a year of intensive marketing effort, and nearly three months after a corporate deal had been finalized, the system began expressing concerns about the impact of the must-carry rules. A few months later, Court TV was told that it still had a good chance if the system were not hit hard with loss of channel capacity. Ultimately, however, Court TV failed to secure a channel slot because the cable system had to award its last spaces to four local broadcasters that had demanded carriage.

4. California

For more than a year Court TV worked closely with executives of Crown Cable, a cable system serving approximately 150,000 subscribers in Riverside, Pasadena, and Alhambra, California. Court TV hosted and produced a televised town meeting with the cable system's owner. Ever since Crown Cable carried Court TV's programming of the Reginald Denny trial on its public access channels, subscribers have contacted both Court TV and Crown Cable to request continued carriage. Crown Cable said that it wanted to carry Court TV and would do so were it not for the 1992 Act's mandatory carriage provisions, but the 1992 must-carry rules forced Crown Cable to add three local broadcast channels, which filled all of its excess capacity.

5. Summary

The examples described above are just that. They are not special cases; nor do they involve unusual circumstances. They illustrate the pervasiveness of the influence of must-carry rules on Court TV's day-to-day relations with cable system operators. The subject of must-carry rules is raised almost immedi-

ately in every conversation with every cable operator. The must-carry rules consistently serve as an impediment to access for Court TV's programming, blocking access to a large percentage of the available slots on nearly all cable systems.

As a result, Court TV is seen less: viewers who prefer Court TV's programming over that provided by the local broadcast stations are disabled from making that choice; and cable system operators who would prefer to offer Court TV's programming are not permitted to make that editorial judgment.

The impact of all this is contrary to the most basic First Amendment notions. Court TV and other cable programmers are impermissibly deprived of their opportunity to be heard when they are denied channel access to accommodate the local broadcasters favored by Congress. Judge Williams's conclusion in his dissenting opinion below is unanswerable: "Given the finite number of cable channels, replacement of the cablecaster's choice of programs with those of local broadcasters suppresses the alternative programs as completely as if Congress had ordered them shut down . . . ." *Turner Broadcasting System, Inc.* v. *FCC*, 819 F. Supp. 32, 59 (D. D.C.), *prob. juris. noted*, 114 S. Ct. 38 (1993) (Williams, J., dissenting) (footnote omitted). Such a result cannot be reconciled with the First Amendment.

CONCLUSION

The decision of the United States District Court for the District of Columbia should be reversed.

Dated: November 9, 1993

Respectfully submitted,

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